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The Honorable Lee Terry
Chairman, Subcommittee Commerce, Manufacturing, and Trade
United States House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jan Schakowsky
Ranking Member, Subcommittee Commerce, Manufacturing, and Trade
United States House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Terry and Ranking Member Schakowsky:

As an Attorney General that has received numerous complaints from small businesses and non-profits throughout my state regarding the expense and disruption caused by abusive patent demand letters, I write to express my thoughts on H.R. ___. I appreciate the subcommittee's efforts to address abusive patent demand letters. But I have serious concerns about the proposed legislation. The proposed bill would create unnecessary obstacles to enforcement and could undermine the States' authority to enforce laws protecting consumers against abusive patent enforcement practices. I urge the Subcommittee to amend the proposed bill to make it a useful and strong tool against patent trolling.

I. The proposed standards are not strong enough and would be too difficult to enforce.

The proposed "bad faith" requirement, which is incorporated into the standards in section 2(a), is unnecessary and will make it too easy for patent trolls to continue their practices. In other commercial speech contexts, such as advertising, the States and the FTC may regulate deceptive and misleading commercial speech without proving intent. Debt collection practices, which also involve potential litigation, are regulated without regard to intent. Persons who engage in a pattern or practice of sending patent demand letters should be held to a similar standard of providing accurate and complete information.

Some specific suggestions for changes to sections 2 and 5(1) follow:

- Section 5(1)(C): Again, I recommend eliminating the bad faith requirement. If the definition of bad faith remains in the bill, the "intentionally avoided" language in Section 5(1)(C) should be removed. A requirement that the "sender intentionally

avoided the truth" negates the "high probability" language and makes subsection (C) is no different than subsection (A), which encompasses knowing statements, representation or omissions.

- Section 2(a)(1)(A) – The bad faith requirement is incongruous with the final clause "and the sender is not a person with such a right." A person should be liable for sending a letter that falsely claims that the person has a right to enforce a patent. Adding an additional requirement that the false statement be made in "bad faith" is an obstacle to enforcement and will make it unnecessarily difficult to protect consumers.

- Section 2(a)(1)(I) – This section creates a double knowledge requirement, to show first that the "sender knew such activity was held, in a final determination, not to infringe a patent" and then to demonstrate bad faith.

- Section 2(a)(2)(C) – This section similarly creates a double knowledge requirement: proving first that the sender knew the recipient's activity was authorized and then proving that the sender acted in bad faith.

- Section 2(a)(3) – There should be no bad faith requirement for affirmative disclosures. The purpose of the affirmative disclosures is to provide strict liability for failure to provide basic information. The information set forth in subsection (3) is information that is minimally necessary for a recipient of a patent letter to comprehend the allegations and determine an appropriate course of action. Requiring proof that information was omitted "with awareness of the high probability of the . . . omissions to deceive" substantially weakens the disclosure requirements. That means consumers will still receive demand letters that provide little information and are accordingly deceptive and unfair.

- Section 2(a)(3)(C), (D) – These two affirmative disclosures already provide that senders may be excused from including the required information if it is not "reasonable under the circumstances." Adding a further required showing of bad faith would make it nearly impossible to enforce under these provisions.

- Section 2(a)(3)(B) – The communication should include all of the patents that the sender alleges have been infringed. The current language would only require that the sender list one patent, even if its actual allegation is that there are seven patents that are being infringed.

- Section 2(b) – In addition to requiring the enforcing agency to prove that the letters were sent in bad faith, this provides the sender with an affirmative defense of good faith. Moreover, good faith is demonstrated by a pattern of sending communications that do not violate the Act. This is completely unnecessary in light of the bad faith requirement. Furthermore, it allows an actor that previously behaved properly a safe harbor to engage in abusive patent communications at a later date. This creates a giant loophole that would eliminate the effectiveness of this legislation.

II. The bill should be carefully drafted to avoid preempting state consumer protection authority and to give states strong and effective tools under federal law.

States, including Vermont, have taken substantial steps to address abusive patent trolling practices under state consumer protection laws. The bill should not weaken this important enforcement tool. States are in the best position to protect their small businesses, nonprofits, and other consumers targeted by abusive patent practices. State consumer protection laws are a strong and flexible tool that state attorneys general regularly use to protect consumers and ensure that commercial practices are honest and fair. My understanding is that the intent of the proposed bill is to leave undisturbed state enforcement authority under existing consumer protection laws. As explained below, the bill should be amended to include clearer language to accomplish that goal:

- Section 4(a) – Subsections (1) and (2) are inconsistent and could significantly interfere with the states' enforcement of their consumer protection statutes. By preempting not only laws, rules and regulations, but also "requirement[s], standard[s], or other provision[s] having the force and effect of law," subsection (1) may be interpreted to preempt states from using their general consumer protection laws to protect small businesses targeted by unfair and deceptive patent licensing communications. This would significantly hamper the ability of states, which have been at the forefront of this issue, to protect their citizens. That language should be removed.

- Section 4(b): Language should be added to either 4(b)(1) or 4(b)(4) that clarifies that bringing suit under federal law is an option for a state attorney general, but the federal action does not displace the authority to bring suit under state consumer protection law.

- Section 4(b)(1) – Requiring that a resident be "adversely affected" would limit the ability of states to act when consumers contact them with an improper patent communication. It ties the hands of states that wish to proactively protect businesses before the businesses pay large amounts of money based on deceptive communications.

- Section 4(b)(1)(B) – Civil penalties are obtained by the State; they are not received on behalf of recipients. There should be both a provision for civil penalties and a separate provision for restitution on behalf of recipients who suffered actual damages as a result of the violation.

- Section 4(b)(2) – As drafted, this provision creates a maximum penalty per sender, irrespective of the number of letters sent or the campaign. This simply encourages patent trolls to engage in numerous, large trolling campaigns. Once an entity has maxed-out liability, it will be allowed to send unfair and deceptive letters with impunity under this section.

I support federal legislation that protects consumers. Consumers that purchase common off-the-shelf technology like scanners and routers should be not targeted with abusive

patent demand letters and asked to pay licensing fees that dwarf the cost of the products they purchased. I have serious concerns, however, that this proposed legislation does little to protect consumers who receive these kinds of demands. The enforcement standards are not strong enough and the bill may be interpreted to undermine critical state enforcement authority. I urge you to amend the bill to make it an effective tool to protect consumers and deter patent trolling.

Thank you for your work on this issue and for considering this input.

Sincerely,

William H. Sorrell
Vermont Attorney General

cc: The Honorable Fred Upton, Chairman, Committee on Energy & Commerce
The Honorable Henry Waxman, Ranking Member, Committee on Energy & Commerce